

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7440

Petition of Entergy Nuclear Vermont Yankee, LLC, and)
Entergy Nuclear Operations, Inc., for amendment of)
their Certificates of Public Good and other approvals)
required under 10 V.S.A. §§ 6501-6504 and 30 V.S.A.)
§§ 231(a), 248 & 254, for authority to continue after)
March 21, 2012, operation of the Vermont Yankee)
Nuclear Power Station, including the storage of spent-)
nuclear fuel –)

Order entered: 4/12/2012

ORDER RE DEPARTMENT CROSS-MOTION FOR DECLARATORY RULING

I. INTRODUCTION

On March 13, 2012, Entergy Nuclear Vermont Yankee, LLC ("ENVY" or "ENVY"), and Entergy Nuclear Operations, Inc. ("ENO" and, together with ENVY, "Entergy VY"), filed a "Motion for Declaratory Ruling Concerning 3 V.S.A. § 814(b) and Chapter 157 of Title 10 of the Vermont Statutes Annotated" ("Declaratory Ruling Motion"). On March 16, 2012, the Vermont Department of Public Service ("Department") filed a Cross-Motion for Declaratory Ruling ("Cross-Motion").

On March 19, 2012, the Public Service Board ("Board") issued an Order denying Entergy VY's Declaratory Ruling Motion. The March 19 Order expressly did not address the Department's Cross-Motion.

The Board established April 3, 2012, as the deadline for responses to the Department's Cross-Motion. On that date, Entergy VY and the Conservation Law Foundation ("CLF") filed letters in response to the Department's Cross-Motion; CLF's letter states that its response is joined by the Vermont Public Interest Research Group ("VPIRG").

On April 9, 2012, the Department filed a letter regarding the representations set forth in Entergy VY's April 3 letter. On April 11, 2012, Entergy VY filed a letter responding to the

Department's April 9 letter, and CLF filed a letter responding to Entergy VY's April 11 letter. On April 12, 2012, the Department filed a Surreply to Entergy VY's April 11 letter.

II. POSITIONS OF THE PARTIES

In its Cross-Motion, the Department requests "a declaratory ruling that all aspects of the CPGs issued in Dockets 6545, 6812 and 7082, including the substantial obligations associated with those CPGs, remain in effect pending a final decision by this Board."¹ The Department notes that Entergy VY has relied on 3 V.S.A. § 814(b) in contending that it may continue to operate the Vermont Yankee Nuclear Power Station ("Vermont Yankee") pending a decision by the Board on issuance of a new or renewed Certificate of Public Good ("CPG"). The Department maintains that the CPGs issued in Dockets 6545, 6812, and 7082, in addition to authorizing operation of Vermont Yankee and storage of spent nuclear fuel, impose significant obligations with which Entergy VY must comply if it continues to operate Vermont Yankee under authority of those CPGs. At pages 7 through 9 of its Cross-Motion, the Department lists ongoing obligations that it contends are imposed by those three CPGs, and asserts that "[b]y extending the license beyond its expiration date, 3 V.S.A. § 814(c) serves not only to extend the privileges associates with the license, but the responsibilities as well."²

In its April 3 letter, Entergy VY states that it:

agrees with the Department that 3 V.S.A. § 814(b) applies and that, pursuant to that provision – which keeps intact Entergy's existing certificates of public good pending the Board's determination of Entergy VY's petition for a certificate of public good authorizing post-March 21, 2012 operations – Entergy VY must comply with the conditions in the existing certificates of public good that the Department lists at pages 7-9 of its cross-motion.³

In its April 3 response, Entergy VY did not object to any aspect of the Department's Cross-Motion.

1. Department Cross-Motion at 1 (footnote omitted).

2. Department Cross-Motion at 10.

3. Entergy VY Response at 1.

CLF and VPIRG contend that "to the extent that Entergy relies on 3 V.S.A. § 814, all the conditions of the CPGs in Dockets 6545, 6812 and 7082 remain in full force and effect and must be complied with."⁴

In its April 9 letter, the Department questions the extent to which Entergy VY has agreed to comply with the conditions set forth in pages 7 through 9 of the Cross-Motion. The Department refers to a media report regarding an Entergy VY spokesperson's statement that a previous press article "got it wrong" in reporting that Entergy VY had agreed to comply with the commitments identified in the Department's Cross-Motion. The Department further states that Entergy VY "has not made its quarterly payment of the \$625,000 due under the Docket 7082 CPG, which was due on April 1, 2012."⁵ The Department asserts that "[s]ince Entergy is permitted to continue to run the plant by operation of law despite time limitations, it must be prepared to comply with *all* of the conditions of those prior CPGs, despite any time limitations imposed within those CPGs."⁶

In its April 11 letter, Entergy VY states:

Entergy VY recognizes that payment of monies into the Clean Energy Development Fund ("CEDF") is a condition of the 2005 Docket No. 7082 Dry Fuel Storage Memorandum of Understanding, between Entergy VY and the Department of Public Service (the "Department") dated as of June 21, 2005 ("2005 MOU"). At the same time, the predicate for the application of that condition is the application of 3 V.S.A. 814(b) to allow Entergy VY to continue operating and storing spent nuclear fuel derived from such operation. Although the Department and Entergy VY agree that Section 814(b) applies, the Board's Order of March 19, 2012, rejects that position.⁷

Entergy VY represents that it will post CEDF payments with an escrow agent, with the escrowed amounts to be paid to the CEDF if:

(1) there is a final decision by the Board or a reviewing court (a) that Section 814(b) applies or (b) granting Entergy VY a certificate of public good to operate the Vermont Yankee Nuclear Power Station and store spent nuclear fuel derived from such operation through March 21, 2032; and (2) the State of Vermont does not impose a tax or other charge above and beyond the CEDF payment schedule

4. CLF Response at 1.

5. Department Letter of 4/9/12 at 2.

6. *Id.* (emphasis in original).

7. Entergy VY Letter of 4/11/12 at 1.

set forth in the 2005 MOU of \$625,000 per quarter (and the remaining CEDF payment for 2012 due on March 31, 2013 under the Docket No. 6812 Memorandum of Understanding).⁸

In its April 11 letter, CLF accuses Entergy VY of "attempt[ing] to unilaterally change the terms of the various Memoranda of Understanding and avoid its obligations under the Certificates of Public Good Entergy acquired in Dockets 6545, 6812 and 7082."⁹ CLF reiterates its earlier contention that "[t]o the extent that Entergy relies on 3 V.S.A. § 814, all the conditions of the Certificates of Public Good (CPGs) in dockets 6545, 6812, and 7082 remain in full force and effect and must be complied with."¹⁰

In its April 12 Surreply, the Department contends that Entergy VY is trying "to back away from the commitment it made in its April 3, 2012 letter."¹¹ The Surreply states that:

The Department continues to believe that Section 814(b) applies, but even if the Board does not agree that § 814(b) applies, Entergy is getting the benefit of § 814(b) because of the district court's ruling, and therefore, as long as Entergy continues operating during the pendency of this proceeding under its present licenses, the Board can enforce the concomitant obligations.¹²

III. DISCUSSION AND CONCLUSION

Before turning to the Department's specific requests, we observe the parties' present and previous filings related to Entergy VY's ability to operate after March 21, 2012, and the terms and conditions that would apply to such operation, have been unclear as to the legal bases for portions of such requests. No party has cited any basis except 3 V.S.A. § 814(b) for the proposition that certain of Entergy VY's obligations extend beyond that date. Parties also have not clearly differentiated between the application of Section 814(b) to the conditions of all the applicable CPGs, other conditions in Board Orders (such as the conditions in Docket 6545 that were limitations on the sale, not on Section 231 obligations), and contractual commitments set forth in Memoranda of Understanding. In particular, no party has presented any analysis as to the

8. *Id.* at 2.

9. CLF Letter of 4/11/12 at 1.

10. *Id.* at 2.

11. Department Surreply at 1.

12. *Id.* at 2.

legal basis on which the Board can alter or extend contractual rights set out in such Memoranda. Accordingly, our analysis below (and in the March 19 Order) does not address such issues, but instead examines only Section 814(b)'s application to CPGs and conditions therein.

Section 814(b) of Chapter 3, Vermont Statutes Annotated, provides:

When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.

In the March 19 Order denying Entergy VY's Motion for Declaratory Ruling, we concluded that while the Docket 6545 CPG itself does not expire, the portion of the CPG that authorizes operation of Vermont Yankee only until March 21, 2012, is extended pursuant to Section 814(b).¹³ We also ruled that Section 814(b) did not apply to the Docket 7082 CPG or obligations not set out in the Docket 6545 CPG, such as those contained in the Docket 6545 Order.¹⁴

The March 19 Order did not address the Docket 6812 CPG, because Entergy VY did not seek a ruling with respect to that CPG in its Declaratory Ruling Motion. The Docket 6812 CPG, which authorized modifications to Vermont Yankee to allow an increase in its generation output, does not have an expiration date, and Entergy VY has not filed an application to extend, renew, or otherwise modify that CPG. Thus, because there is no expiring license, and also because there is no timely application to extend any expiring license, it is clear that Section 814(b) does not apply to the Docket 6812 CPG.

The Docket 6812 CPG and Docket 7082 CPG have not expired, and remain in effect. Thus, Entergy VY must continue to comply with those CPGs, including any continuing obligations set forth in those CPGs. Similarly, because the Docket 6545 CPG has not expired, and the portion of the Docket 6545 CPG that authorizes operation of Vermont Yankee has been extended pursuant to 3 V.S.A. § 814(b), Entergy VY must continue to comply with the

13. Order of 3/19/12 at 15. Therefore, Entergy VY's April 11 letter is incorrect in characterizing the March 19 Order as rejecting the applicability of Section 814.

14. *Id.* at 15–25.

conditions of that CPG, so long as it continues to operate under a putative claim of broad authority from Section 814(b).

Although it is clear that Entergy VY must continue to comply with all conditions set forth in the Docket 6545, 6812, and 7082 CPGs, we are unable to issue a ruling on the continued effectiveness of all of the specific obligations listed on pages 7 through 9 of the Department's Cross-Motion. As the Department notes in its Cross-Motion, some of those obligations are arguably time-limited, and some are established in Memoranda of Understanding rather than directly set forth in a CPG. None of the parties has provided a detailed analysis explaining how each of these obligations remains in effect either by its own terms or through operation of 3 V.S.A. § 814(b).

Lacking sufficient explanation by the parties of the legal basis for concluding that all of the specific identified obligations remains in effect, we deny without prejudice the Department's Cross-Motion.

SO ORDERED.

Dated at Montpelier, Vermont, this 12th day of April 2012.

s/James Volz)	
)	
)	PUBLIC SERVICE
)	
s/David C. Coen)	BOARD
)	
)	OF VERMONT
s/John D. Burke)	

OFFICE OF THE CLERK

FILED: April 12, 2012

ATTEST: s/Judith C. Whitney
Deputy Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)